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In Reply, Refer to:
A55C88

March 9, 2004

E-mail Transmission


Mr Gerald Zimmerman
Chairman
Lower Colorado River Multi-Species Conservation Program
Colorado River Board of California
770 Fairmont Avenue, Suite 100
Glendale, California 91203-1035

Dear Mr. Zimmerman:

The Fish and Wildlife Service (FWS) appreciates the efforts of the California parties in the development of the Lower Colorado River Multi-Species Conservation Program (LCR MSCP) Conservation Plan. The enclosed discussion paper is in response to a task assigned to the FWS at the February 26, 2004 Steering Committee meeting concerning recent developments in issuance of incidental take statements and permits for species determined to be Fully Protected under California law. We have discussed this issue with our Ecological Services and Department of the Solicitor offices in California and have the following information to provide to the LCR MSCP. The discussion paper does not represent a final decision by the FWS on how to proceed for LCR MSCP section 10(a)(1)(B) permit issuance, but does present a proposal to address the issue.

Thank you for your continued efforts to conserve endangered species. If there are comments on this letter prior to March 18, 2004, please contact me (602) 242-0210 (x244) or Lesley Fitzpatrick (x236).

Sincerely,


Steven L. Spangle
Field Supervisor

Enclosure

cc: Regional Director, Fish and Wildlife Service, Albuquerque, NM (ARD-ES)
(Attn: Bryan Arroyo) (Luella Roberts)
Lower Colorado River Coordinator, Fish and Wildlife Service, Phoenix, AZ
Regional Director, Lower Colorado Region, Bureau of Reclamation, Boulder City, NV

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U.S. Fish and Wildlife Service

Arizona Biological Services Office

Discussion Paper for Lower Colorado River Multi-Species Conservation Program

California Fully Protected Species

March 9, 2004

Under California law, there is no provision to allow any "take" of species recognized as Fully Protected. For the LCR MSCP, the Fully Protected species are the razorback sucker (*Xyrauchen texanus*), black rail (*Laterallus jamaicensis coturniculus*), and Yuma clapper rail (*Rallus longirostris yumanensis*). The razorback sucker and Yuma clapper rail are listed as endangered under the Federal Endangered Species Act (FESA), so the FESA incidental take coverage takes effect upon the signing of the section 10(a)(1)(B) permit or acceptance of the biological opinion by the Federal agencies. The black rail is not a listed species, so the FESA take coverage is deferred until such time as it becomes listed. The Fully Protected prohibitions on "take" are currently in effect for all three species.

The FWS in California has recently been involved in a situation where, in a biological opinion for Bureau of Land Management (BLM), we issued an incidental take statement under FESA for a species listed as Fully Protected under California law. The issuance of this incidental take statement was challenged on the basis that the FWS cannot authorize incidental take where doing so would violate state law. The decision in this case rested on the fact that the biological opinion and incidental take statement was issued to a Federal agency, BLM, which is not subject to state

law. The BLM could receive the incidental take statement, and, since this project was proposed to BLM by an applicant, require the applicant to meet the state law before the Federal incidental take statement would be in effect. Since, under the Fully Protected statute, the applicant cannot obtain a state "take" permit, the Federal incidental take statement could not become effective.

The FWS prevailed in the case discussed above because we were not directly issuing an incidental take authorization to the applicant, but were going through a section 7 consultation with another Federal agency that had control over the proposed action being implemented. The situation differs for issuance of an incidental take permit under section 10(a)(1)(B), where the FWS issues the permit directly to the non-Federal parties.

The FWS can only issue an incidental take permit under specific conditions. In the implementing regulations (FR volume 50, number 189, pages 39681-39691) on page 39687 under the discussion of § 17.3, the following definition is added:

"Incidental taking" means any taking otherwise prohibited, if such taking is incidental to, and not the purpose of, the carrying out of an otherwise lawful activity."

The critical focus of the definition is on "an otherwise lawful activity." A lawful activity is one that is not in violation of any laws. In issuance of all incidental take permits, the FWS has routinely stated that all other applicable permits and approvals must be obtained prior to the activity being implemented and the FESA-authorized incidental take occurs. In the case of the California Fully Protected species, the FWS knows at the time of issuance of the incidental take

permit that the California partners in the LCR MSCP cannot, under state law, obtain a permit to take Fully Protected species. In that, the FWS knows that the action for which incidental take is sought is not "an otherwise lawful activity" and cannot issue the incidental take permit for those species in California.

Based on our internal discussions, the FWS believes that our issuance of incidental take permits under FESA for Fully Protected species in California has a significant risk of legal challenge as a result of the ruling on the section 7 incidental take statement case. With this in mind, the FWS proposes the following actions for the LCR MSCP ESA compliance:

1. The FWS will, if appropriate after evaluation of the Conservation Plan in accordance with regulations for permit issuance, issue the incidental take permit for the LCR MSCP partners stating that for covered actions in Arizona and Nevada the permit will cover the incidental take of the razorback sucker, black rail, and Yuma clapper rail.
2. The FWS will, if appropriate after evaluation of the covered actions and Conservation Plan contained in the Biological Assessment, issue an incidental take statement in the biological opinion for the Federal covered actions to cover the take of razorback sucker, black rail, and Yuma clapper rail by the Federal agencies. This conforms to the situation in the recent BLM case.
3. The FWS will, if appropriate after evaluation of the Conservation Plan in accordance with regulations for permit issuance, issue the incidental take permit for the LCR MSCP partners stating that for covered actions in California, the permit does not cover the incidental take of the razorback sucker, black rail, and Yuma clapper rail.

4. Recognizing that the 400,000 acre-foot of transfer water approved under the Quantification Settlement Agreement has a legislative exemption to the terms of the Fully Protected statute, the FWS will, if appropriate after evaluation of the Conservation Plan in accordance with regulations for permit issuance, issue the incidental take permit to include the take from this project. This take is lawful under California state law.
5. The FWS will, if an incidental take permit is issued to the LCR MSCP, include as a changed circumstance that coverage for the razorback sucker, black rail, and Yuma clapper rail for covered actions in California will be authorized once such take is determined to be legal under California law and all appropriate permits to allow such take have been acquired by the California partners.

A suggestion was made at the February 26, 2004 Steering Committee meeting and on the Program Subcommittee conference call on March 1, 2004 that the language describing the "take" in the HCP document be evaluated and revised to not be in conflict with the definition of "take" under CESA and the Fully Protected statutes. The FWS does not believe this is a viable approach because the definition of "take" under the California law is not always consistently applied. The state Attorney General and the California Department of Fish and Game have differing interpretations of the definition. This uncertainty would likely be a factor in any challenge to the LCR MSCP permit focusing on "take" of Fully Protected species.

The sole reason for the FWS to take this step in the incidental take permit issuance is the prohibition of "take" for the Fully Protected species under California law. We considered other

We understand this situation is new to all partners and recognize this presents a difficulty for the California partners. The resolution of this issue must come from within California through resolution of the conflicts within the Fully Protected statute. We will be prepared to discuss this paper at the March 18, 2004 Implementation Subcommittee meeting.

Section IV
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ARNOLD SCHWARZENEGGER, Governor



April 14, 2004

Steven L. Spangle
 Field Supervisor
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Post-It Fax Note	7871	Date	4-26	Page	3
To	Myra	From	HAYES		
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Dear Mr. Spangle:

The Department of Fish and Game ("Department") received a copy of your March 9, 2004 letter and discussion paper to Mr. Jerry Zimmerman. As you know, that discussion paper concluded that as a result of a recent ruling in a Section 7 case, the U.S. Fish and Wildlife Service's ("USFWS") issuance of incidental take permits to non-federal entities under FESA for fully protected species in California has a significant risk of legal challenge. The discussion paper states that the California partners in the Lower Colorado River Multi-Species Conservation Program ("LCR MSCP") cannot, under state law, obtain a permit to take fully protected species. As a result, the discussion paper concluded that the USFWS cannot issue an incidental take permit for LCR MSCP activities because the action for which the take is sought is not "an otherwise lawful activity" as required under federal law.

It is the Department's position that, assuming the permit issuance criteria of the California Endangered Species Act are met, the Department may authorize the take of fully protected species under the LCR MSCP.

Under existing law, assuming other permit issuance criteria are met, the Department may authorize the take of fully protected species for impacts attributable to implementation of the Quantification Settlement Agreement ("QSA"). (Fish & G. Code § 2081.7(a).) QSA is defined broadly to mean: "... the draft Quantification Settlement Agreement (QSA) ... as it may be amended, and that shall include as a necessary component the implementation of the Agreement for Transfer of Conserved Water by and between the Imperial Irrigation District and the San Diego County Water Authority, ... and any QSA-related program that delivers water at the intake of the Metropolitan Water District of Southern California's Colorado River Aqueduct." (Stats. 2002, ch. 617, §1(a).) The legislative language makes it clear that the Department may

Conserving California's Wildlife Since 1870

authorize take of fully protected species for impacts other than those directly attributable to the QSA agreement itself.

There is additional language to support the proposition that the Department can authorize take of fully protected species under the LCR MSCP. Fish and Game Code section 2081.7 states that take of fully protected species may be authorized for impacts on the following:

1. The salinity, elevation, shoreline habitat, or water quality of the Salton Sea;
2. The quantity and quality of water flowing in Imperial Valley drains, rivers, and channels;
3. Agricultural lands in the Imperial Valley; and
4. The quantity and quality of water flowing in the Colorado River, the habitat sustained by those flows, and the collection of that water for delivery to authorized users.

(Fish & G. Code § 2081.7(e), emphasis added.)

The language in subsection 4 above shows the Legislature's intent to allow the Department to authorize take of fully protected species in a large area in and around the Colorado River. The Department is therefore authorized to allow the take of fully protected species for impacts attributable to the QSA, as broadly defined, on the quantity and quality of water flowing in the LCR, and the habitat sustained by those flows. Issuance of permits for take of fully protected species resulting from the collection of Colorado River water for delivery is also authorized. Therefore, take of fully protected species for impacts from covered activities under the LCR MSCP could be authorized under state law.

Additional language supports the concept that the Legislature intended to allow the Department broad discretion to authorize take of fully protected species. In SB 654, the Legislature found:

1. "That it is important to the state to meet its commitment to reduce its use of water from the Colorado River to 4.4 million acre-feet per year. . . .;
2. That "California's Colorado River Water Use Plan is a framework developed to allow California to meet its Colorado River needs from within its basic annual apportionment. . . ."; and
3. "[T]hat species previously designated as fully protected may be taken incidental to activities intended to meet the state's commitment to reduce its use of Colorado River water as long as those activities are found to comply with existing law, including Chapter 1.6 (commencing with section 2050) of Division 3 of the Fish and Game Code."

(Stats. 2002, ch. 613, § 2.)

The above language supports the proposition that for activities intended to meet the State's commitment to reduce its use of water, the Legislature intended to give the Department broad discretion to allow take of fully protected species.

The above language needs to be read together with section 2081.7(a) (which allows the Department to authorize take of fully protected species on a broad range of habitats). When read together, the language from SB 884, along with Fish and Game Code section 2081.7(a), shows that the Department has discretion to authorize the take of fully protected species incidental to activities intended to reduce California's use of Colorado River water, if the impacts from those activities affect the quantity or quality of water flowing in the Colorado River or the habitat sustained by those flows. Issuance of permits for take of fully protected species resulting from the collection of Colorado River water for delivery is also authorized.

In summary, the Department has the authority to authorize take of fully protected species under the LCR MSCP, because existing statutes, as well as non-codified legislative language, show that the Legislature intended to allow the Department broad discretion to authorize the take of fully protected species to help California meet its commitment to reduce its use of Colorado River water, and to allow take in and around the LCR, including activities under the LCR MSCP.

Please call me if you have any questions.

Sincerely,

MICHAEL R. VALENTINE
General Counsel

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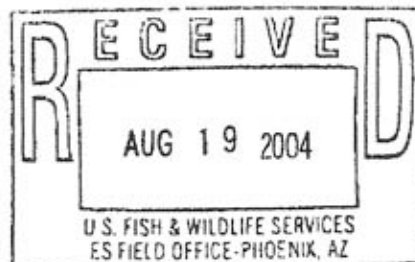
ENVIRONMENTAL DEFENSE
finding the ways that work

August 18, 2004

Mr. Steve Spangle
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Mr. Glen Gould
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Ms. Laura Simonek
Metropolitan Water District of Southern California
700 North Alameda Street
Los Angeles, CA 90012
Via Facsimile 213-217-7701



Dear Mr. Spangle, Mr. Gould, and Ms. Simonek:

Thank you for the opportunity to comment on the Draft Environmental Impact Statement/Environmental Impact Report (DEIS/EIR), Biological Assessment (BA), and Habitat Conservation Plan (HCP) for the Lower Colorado River Multi-Species Conservation Program (LCR MSCP), Arizona, Nevada, and California. In addition to the comments submitted with other non-governmental organizations, Environmental Defense submits these comments to emphasize the critical importance of the limitrophe reach of the Colorado River, and the failure of the LCR MSCP to seize the opportunity to focus restoration efforts there.

The LCR MSCP is missing what may be the premier opportunity to conserve species on the Lower Colorado River, which exists in the limitrophe reach of the river, known in MSCP terminology as reach 7. This reach of the Colorado contains stands of Cottonwood-Willow with a much higher density than that found elsewhere on the Lower Colorado, 18% of land cover in the first 10 kilometers below Morelos Dam as compared to 1-2% as a maximum land cover value along the Lower Colorado River between Lees Ferry and Morelos Dam, even in wildlife refuges (Hinojosa-Huerta et al., 2003. Rapid Ecological Assessment of the Limitrophe Zone of the Colorado River, prepared for Environmental Defense). Significantly, these cottonwood and willow trees

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have established due to recent overbank flooding since 1980, and have been maintained by relatively high groundwater levels. Surface water in reach 7 is a regular feature, providing breeding sites for insects that are food for resident and migrating birds. These conditions have together allowed a healthy native ecosystem to flourish. However, the maintenance of these conditions is not guaranteed, as drought and local groundwater pumping (such as Reclamation's YAWRMG Drainage Project) are both likely to deplete the water available to the limitrophe.

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The LCR MSCP has an opportunity in the limitrophe both to protect habitat whose future is uncertain, as well as to augment this habitat. While the HCP proposes creating cottonwood-willow sites by planting trees and irrigating them, the limitrophe is far better suited to conservation and restoration based on instream flows.¹ Here, a modest baseflow in the river channel, plus occasional floods, would secure the future of this excellent habitat.

The LCR MSCP could contribute significantly to conserving habitat on the Lower Colorado River by adopting a significant ongoing effort to protect and restore the Colorado River limitrophe, specifically a focused effort by the Cocopah Indian Tribe to create an international conservation area (see DEIS/DEIR at 4-24). This process has been underway for several years, and is paralleled by an effort in Mexico to protect the Colorado River riparian corridor from the northern extent of the boundary of the Biosphere Reserve of the Colorado River Delta and Upper Gulf of California.

We hope that the LCR MSCP can be amended to reflect this opportunity. In addition, we note that the LCR MSCP documents incorrectly characterize both the physical and biological qualities of the limitrophe, reach 7.

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1. Throughout the LCR MSCP documents, flows in reach 7, the limitrophe, are erroneously characterized. The text itself is contradictory at times, stating that it "has some flow from dam seepage, but the majority of the reach is generally dry" (3.0-2) and that "much of the flow in the river downstream of Morelos Dam is return flows from upstream irrigation districts" (DEIS/DEIR at 3.9-7). Neither of these statements accurately characterize the source or quantity of flows in the limitrophe. In general, these flows can be understood to come from a variety of sources, including:
 - a. Seepage from Morelos Dam.
 - b. Flows that are released at Morelos Dam, including both flood flows (which occurred more than 25% of years 1980-2000) and other flows that Mexico chooses not to divert, such as occasional over-deliveries from the United States.
 - c. Irrigation return flows from Mexico.

¹ Contrary to Reclamation's assertions otherwise, there is nothing in the Law of the River to prohibit instream flows, and Reclamation fails to point to any support. See DEIS/EIR at 2-116.

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- d. Wasteways (at 11 miles and 21 miles) in the United States that release several thousand acre-feet annually in non-flood years (Ruth Thayer, Bureau of Reclamation, personal communication 8/6/04).
- e. Groundwater flows from both the United States and Mexico. The quantity of groundwater flow into the Colorado River channel in the limitrophe is unknown, however, a recent study demonstrates that depth to groundwater at the edge of the riparian corridor is no greater than 1-2 meters, and that groundwater levels exceed river elevation, suggesting that the direction of flow is into the river (Zamora-Arroyo, et al., 2001. Regeneration of Native Trees in Response to flood releases from the United States into the delta of the Colorado River, Mexico. J. Arid Environments 49:1).

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While most of these inputs are not quantified, the average total flow in the limitrophe in non-flood years 22,000 acre-feet, and in flood years is 2,120,000 acre-feet (Cohen and Henges-Jeck, 2001. Missing Water: The Uses and Flows of Water in the Colorado River Delta Region, Pacific Institute).

2. The importance of reach 7, the limitrophe, for several of the LCR MSCP covered species is neglected:

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- a. The limitrophe is an important stopover site for migrating southwest willow flycatchers in their migration movements before they reach their breeding grounds (Garcia-Hernandez et al., 2001. Willow Flycatcher (*Empidonax traillii*) surveys in the Colorado River delta: implications for management. J. Arid Environments 49:1). It has been well documented, in general for landbirds, that the quality and availability of stopover sites during migration is one of the key factors determining survivorship rates for these species. The description of this bird in Appendix I, "Status of LCR MSCP Covered Species" fails to mention the importance of stopover sites to this migrant (Appendix I at I-7).
- b. Other key species of conservation concern in the limitrophe are the Yellow-billed Cuckoo, Arizona Bell's Vireo, and Summer Tanager, all of which were found present in recent surveys of the limitrophe (Hinojosa-Huerta et al., 2003. Rapid Ecological Assessment of the Limitrophe Zone of the Colorado River, prepared for Environmental Defense). Descriptions of these birds in Appendix I, "Status of LCR MSCP Covered Species" fail to mention their presence in the limitrophe (Appendix I at I-49, I-61, and I-69).

We hope that you are able to incorporate a stronger program for restoration of the Colorado River limitrophe in the final LCR MSCP. Please do not hesitate to contact us if you have any questions.

Env. D-4

Sincerely,



Jennifer Pitt